Supreme Court, U.S.
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No. 92-1145

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARSHALL C. SASSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States has authority under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, to require petitioner to remove barriers that he maintains across naturally occurring streams that are subject to the ebb and flow of the tide.

2. Whether petitioner's barriers are authorized under a "grandfather" provision of the Corps of Engineers' regulations, 33 C.F.R. 330.3(b).

3. Whether the Fifth Amendment requires the United States to pay compensation for removal of the barriers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E1-E22) is reported at 967 F.2d 993. The opinions of the district court (Pet. App. A1-A17, C1-C22) are reported at 738 F. Supp. 177 and 771 F. Supp. 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. F1) was entered on June 23, 1992. Petitioner filed a petition for rehearing out of time, but it was accepted by the court of appeals and denied on July 24, 1992. Pet. App. G1-G2. The petition for a writ of certiorari was filed on October 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the authority of the United States under the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. 401 *et seq.*, to require petitioner to remove barriers he maintains across certain waterways that pass through his property in Georgetown County, South Carolina. The United States District Court for the District of South Carolina ordered petitioner to remove the barriers, Pet. App. D1-D2, and the court of appeals affirmed, *id.* at E1-E22.

1. The RHA broadly prohibits the placement of unauthorized obstructions, including structures, in "waters of the United States." 33 U.S.C. 403. See generally *United States* v. *Alaska*, 112 S. Ct. 1606 (1992). Section 10 of the RHA provides in relevant part that:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any * * * structures in any * * * canal, navigable river, or other water of the United States, * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army * * *.

33 U.S.C. 403. The Secretary of the Army has defined "navigable waters" for purposes of Section 10 to include:

> [T]hose waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to

> transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

33 C.F.R. 329.4. Section 12 of the RHA authorizes the Attorney General to seek an injunction ordering "the removal of any structures or parts of structures erected in violation of [Section 10]." 33 U.S.C. 406.

2. Petitioner has maintained wooden and steel fences across the mouths of two naturally occurring tidal streams that pass through his property and empty into the Pee Dee River and the Intracoastal Waterway. Petitioner concedes that the streams are subject to the ebb and flow of the tide. In response to complaints from recreational boaters, the Army Corps of Engineers directed petitioner to remove the barriers. Petitioner refused, and the United States brought suit pursuant to the RHA to obtain an injunction ordering removal of the structures. Pet. App. A1-A6, E4-E6. The district court concluded on motions for summary judgment that the streams at issue are waters of the United States, *id.* at A1-A17, and that the United States is entitled under the RHA to an injunction ordering removal of the barriers, *id.* at C1-C22.

3. The court of appeals affirmed. Pet. App. E1-E22. It rejected petitioner's argument that this Court's decision in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), an admiralty case holding that "navigable waters" include waters capable of use for conducting interstate commerce, *id.* at 563, sets forth the exclusive test for navigability under the RHA. Pet.

App. E7-E13. "Finding the caselaw from other circuits persuasive," the court concluded that the Corps' longstanding "ebb and flow" test is also "a valid means of determining the Corps' jurisdiction over tidal waters." *Id.* at E13.

The court also rejected petitioner's argument that the barriers are authorized under a "grandfather" provision of the Corps' regulations, 33 C.F.R. 330.3(b). The court concluded that the provision is inapplicable because it expressly applies only to structures that cause no "interference with navigation." Pet. App. E13-E16. Finally, the court found no merit in petitioner's contentions that the Corps failed to follow its own procedural requirements, *id.* at E16-E18, and that the Fifth Amendment requires the United States to pay compensation in connection with removal of the barriers, *id.* at E19-E22.

ARGUMENT

Petitioner basically contends that the United States has no authority to require him to remove his obstructions to navigation, because the natural streams he has obstructed are currently of use only to recreational boaters. The court of appeals correctly rejected petitioner's arguments, its decision does not conflict with any decision of this Court or another court of appeals, and the issues presented do not warrant further review.

1. Petitioner reasserts his argument that this Court's admiralty decision in *The Daniel Ball*, *supra*, provides the exclusive test for determining navigability under the RHA. Pet. 12-24. Petitioner cites numerous cases endorsing *The Daniel Ball*'s so-called "navigable in fact" test, but he fails to cite a

single case identifying that test as the *exclusive* one for purposes of the RHA. The Army Corps of Engineers has correctly concluded that its regulatory jurisdiction under the RHA also extends to coastal waters, such as the natural streams here, that are subject to the ebb and flow of the tide. See 33 C.F.R. 329.4.

The Corps' regulatory definition restates settled law, which has long treated as navigable those waters that are subject to the ebb and flow of the tide. See, *e.g.*, *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469 (1988) (land beneath tidal waters passed to States, even if waters were not navigable in fact); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 & n.6 (1979) (noting that tidal waters are subject to the Corps' regulatory jurisdiction). See also, *e.g.*, 4 *Waters and Water Rights* 131 & n.83 (R. Beck ed. 1991) ("even when not navigable in fact, waters subject to the ebb and flow of the tide are considered as 'navigable at law' for purposes of federal regulatory authority").

As the court of appeals recognized, every court of appeals that has addressed the issue has held that the "ebb and flow" test is a "valid test for determining the Corps' jurisdiction over coastal waters." Pet. App. E11-E12. See *United States* v. *DeFelice*, 641 F.2d 1169, 1172-1175 (5th Cir.), cert. denied, 454 U.S. 940 (1981); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 749-753 (9th Cir. 1978); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 608-610 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). The issue does not warrant further review.*

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* Petitioner attempts to distinguish those cases (Pet. 16-18) on the ground that they involve dredge and fill permits under

2. Petitioner also raises among his questions presented (Pet. iii) the issue whether his obstructions are subject to a "grandfather" provision in the Corps' regulation that authorizes certain structures in existence prior to 1968. See 33 C.F.R. 330.3(b). Petitioner, however, provides no supporting argument in the body of his petition. The court of appeals correctly concluded that petitioner does not qualify for the exemption, because the exemption is limited to structures that cause no "interference with navigation" and his barriers are specifically designed to prevent boaters from using the streams. Pet. App. E14-E16. See *Fisher* v. *Danos*, 595 F. Supp. 461, 466-467 (E.D. La. 1984) (jetties completed before cutoff fell outside exemption because they were hazards to navigation), aff'd, 774 F.2d 1158 (5th Cir. 1985) (Table); see also *United States* v. *Cumberland Farms, Inc.*, 647 F. Supp. 1166, 1178-1180 (D. Mass. 1986), aff'd, 826 F.2d 1151, 1157-1160 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988); *Vieux Carre*

Section 10 and the Federal Water Pollution Control Act, and not removal of an obstruction under Section 10. But that is a distinction without a difference. All Section 10 cases present the same core grievance: the failure of the landowner to seek a permit before taking action that might affect the waters. See, *e.g.*, *United States* v. *Ray*, 423 F.2d 16, 19 (5th Cir. 1970) (navigability finding supports Corps' jurisdiction over both obstruction and dredge and fill permitting). Petitioner also incorrectly contends (Pet. 27-28) that without "two public termini" a waterway cannot be found navigable. Pet. 20-21. Harbors provide an obvious example. See also *United States* v. *Lamastus & Assocs.*, 785 F.2d 1349, 1353 n.7 (5th Cir. 1986) ("A waterway is no less capable of sustaining interstate commerce because it only opens at one end."); 33 C.F.R. 329.8 (canals open at only one end may be navigable).

Property Owners, Residents & Assocs. v. *Brown*, 875 F.2d 453, 464 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990).

3. Petitioner additionally contends (Pet. 23-26) that an order requiring that he remove his barricades amounts to a compensable taking of his property under the Fifth Amendment. He relies on this Court's decision in *Kaiser Aetna*, *supra*, and the Ninth Circuit's decision in *Boone* v. *United States*, 944 F.2d 1489 (1991). Those decisions, however, involve a different issue. In both of those cases, the question was whether the government could invoke its navigational servitude to require public access to a formerly enclosed Hawaiian lagoon that was private property under state law. See *Kaiser Aetna*, 444 U.S. at 165-166; *Boone*, 944 F.2d at 1491-1492. The question here, by contrast, is whether the government has authority under the RHA to require removal of unauthorized obstructions placed at the mouth of navigable waters. Moreover, as the court of appeals recognized, the waters at issue here are *not* private property under state law. Petitioner has no right under state law, comparable to the rights of the Hawaiian owners of enclosed lagoons, to exclude persons from the streams that pass through his lands. Pet. App. E20. See *State ex rel. Medlock* v. *South Carolina Coastal Council*, 346 S.E.2d 716, 719 (S.C. 1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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